



**SDMS Doc ID 2037646**

IN THE MATTER OF:	)	AGREEMENT FOR RECOVERY
	)	OF PAST RESPONSE COSTS
Richmond Townhouses Apartments	)	
Superfund Site	)	
Richmond, Contra Costa County	)	
California	)	U.S. EPA Region IX
	)	CERCLA Docket No. 2004-06
Richmond Townhouses Apartments, Ltd.;	)	
Partnership Investor Services, Inc.;	)	
Westport Housing Corporation;	)	
Stephen D. Moses; and S. Chandler Sweetser, Jr.	)	
	)	
SETTLING PARTIES	)	PROCEEDING UNDER
	)	SECTION
	)	122(h)(1) OF CERCLA
	)	42 U.S.C. § 9622(h)(1)

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## **I. JURISDICTION**

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9622(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D and redelegated to the Superfund Branch Chief by EPA Regional Delegation No. 1290-20.

2. This Agreement is made and entered into by EPA and Richmond Townhouses Apartments, Ltd., a District of Columbia corporation ("RTA"); Partnership Investor Services, Inc., a District of Columbia corporation and former general partner of RTA; Westport Housing Corporation, a Delaware corporation and general partner of RTA (d/b/a National Westport Housing Corporation); Stephen D. Moses, a former general partner of RTA; and S. Chandler Sweetser, Jr., a former general partner of RTA ("Parties"). The Settling Parties that are former or current general partners of RTA enter into this Agreement solely in their capacity as former or current general partners of RTA and not in an independent capacity or with regard to any other potential basis for liability.

Each Party consents to and will not contest EPA's authority to enter into this Agreement or to implement or enforce its terms.

## **II. BACKGROUND**

3. This Agreement concerns the Richmond Townhouses Apartments Superfund Site ("Site") located in Richmond, California. EPA alleges that the Site is a "facility" as defined by

**CERCLA SECTION 122(h)(1) AGREEMENT  
FOR RECOVERY OF PAST RESPONSE COSTS**

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Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604.

5. In performing a response action, EPA has incurred response costs at or in connection with the Site.

6. EPA alleges that Settling Parties are responsible parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and are jointly and severally liable for response costs incurred or to be incurred at or in connection with the Site.

7. EPA and the Settling Parties recognize that this Agreement has been negotiated in good faith and that this Agreement is entered into without the admission or adjudication of any issue of fact or law.

### **III. PARTIES BOUND**

8. This Agreement shall be binding upon EPA and upon Settling Parties and their successors and assigns. Any change in ownership or corporate or other legal status of a Settling Party, including but not limited to, any transfer of assets or real or personal property, shall in no way alter such Settling Party's responsibilities under this Agreement. Each signatory to this Agreement certifies that he or she is authorized to enter into the terms and conditions of this Agreement and to bind legally the party represented by him or her.

### **IV. DEFINITIONS**

9. Unless otherwise expressly provided herein, terms used in this Agreement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meanings assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, the following definitions shall apply:

a. "Agreement" shall mean this Agreement and any attached appendices. In the event of conflict between this Agreement and any appendix the Agreement shall control.

b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

c. "Day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "EPA" shall mean the United States Environmental Protection Agency and any

successor departments, agencies or instrumentalities of the United States.

e. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.<sup>1</sup>

f. "Paragraph" shall mean a portion of this Agreement identified by an Arabic numeral or a lower case letter.

g. "Parties" shall mean EPA and the Settling Parties.

h. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that EPA or the U.S. Department of Justice on behalf of EPA has paid at or in connection with the Site through the date of the close of escrow of the sale of the Site as described in Section V of this Agreement.

i. "Section" shall mean a portion of this Agreement identified by a Roman numeral.

j. "Settling Parties" shall mean Richmond Townhouses Apartments, Ltd., a District of Columbia limited partnership ("RTA"); Partnership Investor Services, Inc., a District of Columbia corporation and former general partner of RTA; Westport Housing Corporation, a Delaware corporation and general partner of RTA; Stephen D. Moses, a former general partner of RTA; and S. Chandler Sweetser, Jr., a former general partner of RTA.

k. "Site" shall mean the Richmond Townhouse Apartments Superfund Site, encompassing approximately 10 acres, located at 2989 Pullman Avenue, Assessor's Parcel Number 513-010-019, in Richmond, Contra Costa County, California generally shown on the map included in Appendix A.

l. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

## **V. PAYMENT OF RESPONSE COSTS**

10. The Site is now the subject of an agreement for purchase and sale between Settling Party Richmond Townhouses Apartments Ltd. (as seller) and Carlson Boulevard, L.P. (as buyer),

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<sup>1</sup> The Superfund currently is invested in 52-week MK notes. The interest rate for these MK notes changes on October 1 of each year. Current and historical rates are available online at [http://www.epa.gov/budget/finstatement/superfund/int\\_rate.htm](http://www.epa.gov/budget/finstatement/superfund/int_rate.htm).

for the sale of the Richmond Townhouses Apartments. Within 30 days of the close of escrow of the sale of the Richmond Townhouses Apartments to Carlson Boulevard, L.P., the Settling Parties shall pay to EPA \$1,400,000. In the event that the sale does not close escrow by February 15, 2004, this Agreement may be extended in writing signed by all Parties.

11. Payment shall be made to EPA by Electronic Funds Transfer ("EFT") in accordance with current EFT procedures to be provided to Settling Parties by EPA Region IX, and shall be accompanied by a statement identifying the name and address of the party(ies) making payment, the Site name, the EPA Region and Site/Spill ID Number 09-FV, and the EPA docket number for this action.

12. At the time of payment, Settling Parties shall also send notice that payment has been made to EPA in accordance with Section XII (Notices and Submissions). Such notice shall reference the EPA Region and Site/Spill ID Number 09-FV and the EPA docket number for this action.

13. The total amount to be paid pursuant to Paragraph 10 shall be deposited in the EPA Hazardous Substance Superfund.

#### **VI. FAILURE TO COMPLY WITH AGREEMENT**

14. Interest on Late Payments. If any Settling Party fails to make any payment required by Paragraph 10 by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

15. Stipulated Penalty.

a. If any amounts due to EPA under Paragraph 10 are not paid by the required date, the Settling Parties shall be in violation of this Agreement and shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 14, \$2,500 per violation per day that such payment is late.

b. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made payable to "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall reference the name and address of the party making payment, the Site name, the EPA Region and Site Spill ID Number, and the EPA Docket Number for this action. Settling Parties shall send the check (and any accompanying letter) to:

EPA - Cincinnati Accounting Operations  
Attention: Region 9 Receivables  
P.O. Box 371099M  
Pittsburgh, PA 15251

c. At the time of each payment, Settling Parties shall also send notice that payment has been made to EPA in accordance with Section XII (Notices and Submissions). Such notice shall identify the EPA Region and Site Spill ID Number 09-FV and the EPA Docket Number for this action.

d. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified Settling Parties of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

16. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to EPA by virtue of Settling Parties' failure to comply with the requirements of this Agreement, any Settling Party who fails or refuses to comply with the requirements of this Agreement shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States, on behalf of EPA, brings an action to enforce this Agreement, Settling Parties shall reimburse the United States for all costs of such action, including but not limited to, costs of attorney time.

17. The obligations of Settling Parties to pay amounts owed to EPA under this Agreement are joint and several. In the event of the failure of any one or more Settling Parties to make the payments required under this Agreement, the remaining Settling Parties shall be responsible for such payments.

18. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Agreement. Payment of stipulated penalties shall not excuse Settling Parties from payment as required by Section V or from performance of any other requirements of this Agreement.

## **VII. COVENANT NOT TO SUE BY EPA**

19. Covenant Not to Sue by EPA. Except as specifically provided in Section VIII (Reservations of Rights by EPA), EPA covenants not to sue or take administrative action against Settling Parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant shall take effect upon receipt by EPA of all amounts required by Section V (Payment of Response Costs) and any amounts due under Section VI (Failure to Comply with Agreement). This covenant not to sue is conditioned upon the satisfactory performance by Settling Parties of their obligations under this Agreement. This covenant not to sue extends only to Settling Parties and does not extend to any other person.

## **VIII. RESERVATIONS OF RIGHTS BY EPA**

20. EPA reserves, and this Agreement is without prejudice to, all rights against Settling Parties with respect to all matters not expressly included within the Covenant Not to Sue by EPA

in Paragraph 19. Notwithstanding any other provision of this Agreement, EPA reserves all rights against Settling Parties with respect to:

- a. liability for failure of Settling Parties to meet a requirement of this Agreement;
- b. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs;
- c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;
- d. criminal liability; and
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

21. Nothing in this Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation or other entity not a signatory to this Agreement.

#### **IX. COVENANT NOT TO SUE BY SETTLING PARTIES**

22. Settling Parties covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs or this Agreement, including but not limited to:

- a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;
- b. any claims arising out of the response actions at the Site for which the Past Response Costs were incurred, including any claim under the United States Constitution, the Constitution of the State of California, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; and
- c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.

23. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).



## **X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

24. Nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Agreement. The Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

25. EPA and Settling Parties agree that the actions undertaken by Settling Parties in accordance with this Agreement do not constitute an admission of any liability by any Settling Party. Settling Parties do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in Section II of this Agreement.

26. The Parties agree that Settling Parties are entitled, as of the effective date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Agreement. The "matters addressed" in this Agreement are Past Response Costs.

27. Each Settling Party agrees that with respect to any suit or claim for contribution brought by any or all of them for matters related to this Agreement, it will notify EPA in writing no later than 60 days prior to the initiation of such suit or claim. Each Settling Party also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Agreement, it will notify EPA in writing within 10 days of service of the complaint or claim upon it. In addition, each Settling Party shall notify EPA within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Agreement.

28. In any subsequent administrative or judicial proceeding initiated by EPA, or by the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Parties shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue by EPA set forth in Section VII.

## **XI. SITE ACCESS**

29. Settling Parties shall, commencing on the Effective Date of this Agreement, provide EPA, the State of California, and their representatives, including contractors, with access at all reasonable times to the Site, or to such other property, for the purpose of conducting any response activity related to the Site, including, but not limited to, the following activities:

1. Monitoring, investigation, removal, remedial or other activities at the Site;
2. Verifying any data or information submitted to the United States or the State;
3. Conducting investigations relating to contamination at or near the Site;
4. Obtaining samples;
5. Assessing the need for, planning, or implementing response actions at or near the Site; and
6. Assessing Settling Parties' compliance with this Agreement.

The access provisions in Paragraph 29 shall not apply to Settling Parties after close of escrow of the sale of Richmond Townhouses Apartments to Carlson Boulevard, L.P.

30. Notwithstanding any provision of this Agreement, EPA and the State retain all of their access authorities and rights, as well as all of their rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulations.

## **XII. RETENTION OF RECORDS**

31. Until 3 years after the effective date of this Agreement, each Settling Party shall preserve and retain all records, reports, or information (hereinafter referred to as "records") now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or to the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

32. After the conclusion of the 3-year document retention period in the preceding paragraph, Settling Parties shall notify EPA at least 90 days prior to the destruction of any such records and, upon request by EPA, Settling Parties shall deliver any such records to EPA. Settling Parties may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Parties assert such a privilege, they shall provide EPA with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to EPA in redacted form to mask the privileged information only. Settling Parties shall retain all records that it claims to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Parties' favor. However, no records created or generated pursuant to the requirements of this or any other

settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

33. Each Settling Party hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

### **XIII. NOTICES AND SUBMISSIONS**

34. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to EPA and Settling Parties.

#### **As to EPA:**

Janet Magnuson, Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region IX  
Office of Regional Counsel, ORC-3  
75 Hawthorne Street  
San Francisco, California 94105  
Facsimile No. (415) 947-3570

#### **As to Settling Parties:**

Max Perry, Esq.  
12100 Wilshire Boulevard  
Suite 1400  
Los Angeles, California 90025  
Facsimile No. (310) 207-5066

### **XIV. INTEGRATION/APPENDICES**

35. This Agreement and Appendix A constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Agreement. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Agreement.

The following appendices are attached to and incorporated into this Agreement: "Appendix A" is a map of the Site.

#### **XV. PUBLIC COMMENT**

36. This Agreement shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

#### **XVI. ATTORNEY GENERAL APPROVAL**

37. The Attorney General or his designee has approved the settlement embodied in this Agreement in accordance with Section 122(h)(1) of CERCLA, 42 U.S.C. § 9622(h)(1).

#### **XVII. EFFECTIVE DATE**

38. The effective date of this Agreement shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 36 has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Agreement.

IT IS SO AGREED:

U.S. Department of Justice  
Environment and Natural Resources Division

By:

\_\_\_\_\_  
Thomas L. Sansonetti  
Assistant Attorney General

\_\_\_\_\_  
Date

U.S. Environmental Protection Agency

By:

Daniel A. Meer  
Daniel A. Meer, Chief  
Response, Planning and Assessment Branch

12 November 2003  
Date

Los Angeles, California 90025  
Facsimile No. (310) 207-5066

#### **XIV. INTEGRATION/APPENDICES**

35. This Agreement and Appendix A constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Agreement. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Agreement. The following appendices are attached to and incorporated into this Agreement: "Appendix A" is a map of the Site.

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#### **XVI. ATTORNEY GENERAL APPROVAL**

37. The Attorney General or his designee has approved the settlement embodied in this Agreement in accordance with Section 122(h)(1) of CERCLA, 42 U.S.C. § 9622(h)(1).

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38. The effective date of this Agreement shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 36 has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Agreement.

IT IS SO AGREED:

U.S. Department of Justice  
Environment and Natural Resources Division

By:

Kelly A Johnson  
~~Thomas L. Sansonetti~~

11/21/03  
Date

Acting

Assistant Attorney General

THE UNDERSIGNED SETTLING PARTY enters into this Agreement in the matter of U.S. EPA Region IX CERCLA Docket No. 2004-06, relating to the Richmond Townhouses Apartments Superfund Site:

FOR SETTLING PARTIES:

RICHMOND TOWNHOUSES APARTMENTS, LTD.  
a District of Columbia limited partnership

By: Westport Housing Corporation  
its General Partner

By:   
Deane Earl Ross, President

11-12-03  
Date

PARTNERSHIP INVESTORS SERVICES, INC.  
a District of Columbia corporation

By:   
Jay Wall, Vice President

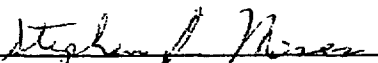

11/12/03  
Date

WESTPORT HOUSING CORPORATION  
a Delaware corporation

By:   
Deane Earl Ross, President

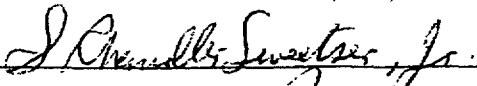
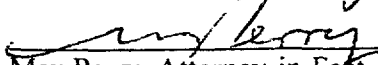
11-12-03  
Date

STEPHEN D. MOSES, an Individual

  
By:   
Deane Earl Ross, Attorney-in-Fact  
Pursuant to the Power of attorney  
dated October 2, 1996

11-12-03  
Date

S. CHANDLER SWEETSER, JR., an Individual

  
By:   
Max Perry, Attorney-in-Fact  
Pursuant to the Power of Attorney  
dated November 14, 1994.

November 12, 2003  
Date